RECENT CASES.

CONSTITUTIONAL LAW—VESTED RIGHTS.—A trust to receive the rents and profits of real property was established at a time when the only law subjecting trust funds to the claims of creditors was the Act of 1896, under which only the surplus beyond the sum necessary for the support or education of the beneficiary, was liable to be applied to the payment of his debts. Subsequently the legislature passed a statute subjecting ten per cent. of the income of trust funds to the claims of creditors. The New York Court of Appeals, by a vote of four to three, held that the statute was retroactive; and that it does not violate the constitutional limitations as to the impairment of contracts and the interference with vested rights. Brearley School v. Ward, 94 N. E. Rep. 1001 (N. Y. 1911).

The majority opinion of the court takes the position that there was no contract to which the trustee was a party, which could be impaired by the retroactive enforcement of the statute. The dissenting judges held, on the other hand, that the statute impairs the contract between the trustee and his *cestui*. But it is much to be doubted whether, in a strict sense, a contract exists between the beneficiary and his trustee. True, a trustee is responsible to his *cestui* as a fiduciary, and is liable if he has violated his trust. But until the trust has been fully executed and the accounts settled up an action at law will not lie against the trustee. Perry on Trusts, Sec. 843.

The question remains, whether the statute, operating retroactively, interferes with a vested right. A vested right has been defined as "an immediate fixed right of present or future enjoyment." Fearne, Cont. Rem., 1. And the Supreme Court of Pennsylvania has decided that a vested right exists "where a man has power to do certain actions, or to possess certain things, according to the laws of the land." Eakin v. Raub, 12 Serg. & Rawle (Pa.) 330, 360 (1825).

Tested by these definitions, the exemption of all but the surplus of trust funds under the New York statute of 1896 would seem to be a vested right. But the authorities take a contrary view. It has been definitely decided that the exemption privileges of a debtor are not vested rights. Leak v. Gray, 107 N. C. 468; Bull v. Conroe, 13 Wis. 233. A homestead exemption is not a vested right. Mooney v. Moriarity, 36 Ill. App. 175; Noble v. Hook, 24 Cal. 638. An exemption from taxation does not confer a vested right, and may, therefore, be modified by the legislature. Shiner v. Jacobs, 62 Iowa 392; People v. Board of Assessors, 84 N. Y. 610. And in Short's Estate, 16 Pa. 63 (1851), it was held that an act subjecting property to a collateral inheritence tax, although applicable by its terms to property of a decedent who died before its passage, is not unconstitutional. The conclusion reached in Brearley School v. Ward, seems, therefore, to rest on a basis of settled law.

COPYRIGHTS—MISTAKES AS PROOF OF INFRINGEMENT.—The complainant and the defendant were competitors in the business of publishing annotations, or citations, of judicial decisions. The defendant was charged with misusing the complainant's copyrighted compilations as the basis of their publications and to prove such misuse the complainant showed that there existed in their publications covering the decisions of the Courts of New York State some one hundred and thirty-eight errors and inaccuracies and that the same precise errors and mistakes were to be found in the defendant's publications. The Court held that the existence of the same mistakes in these respective compilations was proof positive of copying and since the defendant's books were regularly published subsequently to those of the complainant, an in-

junction was issued to restrain the further publication and sale of the defendant's books. Frank Shepard Co. v. Zachary P. Taylor Publishing Co., 185 Fed. 941 (1911).

This case is interesting only as showing that a portion of the pirated matter, which the defendant company would most glady have refrained from using, caused the discovery of their unfair methods. In the case of similar books where a close resemblance is a necessary consequence of the use of the same materials, the occurrence of the same errors affords one of the surest tests of copying. List Publishing Co. v. Kellar, 30 Fed. 772. The copying of the mistakes being proved, it is a fair presumption that the subsequent compiler made use of more than the mistakes of his predecessor and unless he is willing to prove just how much of the book is pirated an injunction will lie to restrain the publication of the whole. West Publishing Co. v. Lawyers' Co.-operative Publishing Co., 79 Fed. 756; Williams v. Smythe, 110 Fed. 961.

EXTRADITION—INTERPRETATION AND ENFORCEMENT OF INTERNATIONAL TREATY.—A United States citizen, accused of murder in Italy, fled to the United States. His extradition was demanded by the Italian Government under a treaty providing that "persons" accused of crime shall be delivered up on demand. Italy, against the protest of the United States Government, interprets the word "persons" to exclude Italian citizens. It was argued, in habeas corpus proceedings, that the treaty was reciprocal; and that the refusal of Italy to surrender her own citizens under the treaty had abrogated it in so far as the surrender of American citizens by the United States is concerned, even if the word "persons" includes United States' citizens. Held, that the word "persons" includes citizens; and that it is not for the judiciary to annul or modify treaties which still have the sanction of the other branches of the government. *Ex parte* Charlton, 185 Fed. 880 (1911).

The court's interpretation of the word "persons" as used in the treaty appears to be both reasonable and in accordance with the broad meaning given the word in other connections. In Wing Wong v. United States, 16 Sup. Ct. 977, 163 U. S. 228 (1895), it was held that the word "persons" in the fifth amendment of the Constitution is broad enough to include any and every human being within the jurisdiction of the Republic. Hence an alien-born resident is entitled to the same protection under the laws, which a citizen can demand. "Person" has also been held to include Indians, within the Habeas Corpus Act, United States v. Crook, 25 Fed. Cas. 695 (1879), even though Indians are not citizens under the Constitution. Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41 (1884). And in Central R. R. Co. of New Jersey v. Pennsylvania R. R. Co., 31 N. J. Eq. 475, 480, 483 (1879), it was held that non-residents are "persons" within the meaning of a general law authorizing a given number of persons to form a corporation to construct a railroad. So also, private corporations have been held to be "persons" within the fourteenth amendment. Home Ins. Co. v. State of New York, 134 U. S. 594 (1889). A county has been held a "person," in Lyman County v. State, 9 S. D. 413, 69 N. W. 601 (1896); and a foreign nation, in Republic of Honduras v. Soto, 19 N. E. 845, 112 N. Y. 310, 2 L. R. A. 642 (1889).

Having decided that the subject matter of the treaty includes citizens of the United States, the court merely applied a line of United States Supreme Court decisions which held that it is not for the judiciary to decide whether or not the treaty is still in force. In Foster v. Neilson, 2 Pet. 253, 314 (1829), Chief Justice Marshall held that where treaties import contracts, "when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department." And it was decided, in Doe v. Broden, 57 U. S. 635, 656 (1853), that whether or not the King of Spain had power, according to the Constitution of Spain, to annul a certain land grant and cede it by treaty to the United States, was a political, not a judicial, question. Still more pertinent to the question raised in the recent case, is Terlinden v. Ames, 184 U. S. 270 (1901). In that case

it was held that the existence of the treaty of June 16, 1852, between the United States and Prussia, which had been repeatedly recognized by both governments as still in force, notwithstanding the incorporation of Prussia into the German Empire, could not be questioned by the judicial department in proceedings for a habeas corpus to prevent the extradition of a fugitive from Prussia. The question is political, and the courts must accept the determination thereof by the political department of the government.

MUNICIPAL CORPORATIONS—IRREGULAR CONTRACTS—EFFECT OF PART PERFORMANCE.—A city, having power to grant an exclusive franchise for the electric lighting of the city for a term of twenty years, undertook to grant such a franchise by an ordinance which was void because the yeas and nays of the city council were not entered upon the minutes as required by law. The grantee company accepted the contract, built a plant, and furnished light to the city and its inhabitants for a period of sixteen years. The city itself then planned to erect a municipal lighting plant and the company sought an injunction to restrain the city from violating the franchise; but the court held that the contract was void from the beginning and the fact that it had been performed by the company for such a length of time with the acquiescence of the city did not give the franchise any validity such as would give the company the right to enforce it in equity for the remainder of the term. Monett E. L. P. & I. Co. v. Incorporated City of Monett, 186 Fed. 360 (1911).

The reasoning of the court is in accordance with precedent. Whenever the state legislature has made mandatory a certain course of procedure in the passage of municipal ordinances, such course of procedure must be substantially complied with to give any validity to an ordinance or to a contract made in compliance with it. City of Logansport v. Dykeman, *et al.*, 116 Ind. 15. A contract informally and irregularly made may be subsequently ratified; but the act of ratification of an unauthorized contract must comply with the provisions of the statute regulating the manner of entering into the original contract. Borough of Milford v. Milford Water Co., 124 Pa. 610 (1899). No partial or complete performance of an unauthorized contract will of itself serve to make it valid. McMannis v. Philadelphia, 210 Pa. 616 (1902).

A person dealing with a municipal corporation must see to it at his peril that the law is complied with and the contract executed in a legal manner. McDonald v. Mayor, &c., 68 N. Y. 23. But the person who has furnished money or property to a municipality in pursuance of an irregular contract is not left absolutely without remedy. Under such circumstances the municipality is subject to an implied obligation to return the money or property in its possession and the law, independent of any statute, will compel restitution or compensation. Hitchcock v. Galveston, 96 U. S. 341; Marsh v. Fulton, 10 Wallace, 676.

When the municipality has performed its part of an irregular contract, the other contracting party may not avoid liability by pleading that the contract was beyond the power of the municipality or executed in an irregular manner. Some cases hold that he is estopped from so doing. Northampton County's Appeal, 30 Pa. 305 (1858). Others hold, improperly it seems, that the action of the city in attempting to enforce its claims under the contract at law is a ratification of the contract. Amberson Ave. 179 Pa. 634 (1897); Sandy Lake Borough v. Gas. Co., 16 Super. Ct. 234 (1901). By this reasoning the courts refuse to allow legislation which is intended to protect the citizens of municipalities from improper debts to be used as a means of doing injustice to the municipality.

WILLS—CONTRACTS TO MAKE LEGACIES—CONSIDERATION.—In Smith v. Oliver, 1911 S. C. (Scotland) 103 (1910), the defendant's testatrix became interested in the erection of a church in the vicinity of her home. As the neighborhood was a poor one, the plans were drawn for a building of an un-

pretentious nature. The testatrix expressed her dissatisfaction with such a scheme and, expressing a desire that the church should be much more elaborate, she indicated generally that she would meet whatever extra cost might be involved. There was no evidence of a written obligation. The testatrix was unable to make payment of any large sum during her lifetime, due to the fact that her income was derived from trust funds, the capital of which was not at her disposal while she lived. During the completion of the plans, the testatrix was consulted at various times and her wishes conformed to. She assured the plaintiff that the necessary funds should be provided at her death. By her instruction, a codicil to her will making the requisite bequest was drawn but was never executed. It was held that it is perfectly possible for one to bind himself in his lifetime to leave something in his will, but that a mere promise cannot be turned into a contract by the promisee simply averring that on the faith of the promise certain things were done by him. As the transaction amounted to a gift, therefore, and there was no evidence of it in writing, recovery was denied.

It is well established that a contract to leave something by will, if founded upon valid consideration will be substantiated, Wright v. Tinsley, 30 Mo. 389 (1860); Martin v. Wright, 13 Wend. 460 (1835); Updike v. Ten Broeck, 32 N. J. L. 105 (1866); Thompson v. Stevens, 71 Pa. 161 (1872). It it also well settled that a promisee cannot enforce a gratuitous promise by merely showing that relying on the promise, he expended various sums of money or incurred other detriment. This will not constitute a valid consideration. Osborn v. Governors of Guy's Hospital, 2 Strange, 728 (1740); McClure v. McClure, 1 Pa. 374 (1845).

Some of the cases have needlessly confused this question with the Statute of Frauds. In Roehl v. Haumesser, 114 Ind. 311 (1887), it was held that under the seventeenth section, such an agreement must be in writing; but the rule laid down in Wellington v. Apthorp, 145 Mass. 69, 1887, that such cases do not fall within the operation of this section seems preferable. It has been held that such contracts were within the provision of Sec. 4, cl. 5, of 29 Car. II, in that they were not to be performed within one year from the making thereof. Vanduyne v. Vreeland, 12 N. J. Eq. 142 (1858), but this has not been followed, Updike v. Ten Broeck, 32 N. J. L. 105 (1866), and under the principles generally adopted in the interpretation of this section, the former case is undoubtedly wrong. Fulton v. Emblers, 3 Burr 1278 (1762); Blake v. Voigt, 134 N. Y. 69 (1892); Day v. N. Y. Cent. R. R., 89 N. Y. 616 (1882).

Although, as the court recognizes, a particular hardship is done in this case, the decision is sound and enunciates clearly the well-settled principles of the law.

WILLS—PRESUMPTION REGARDING WORDS FOLLOWING THE SIGNATURE.—In Taylor's Estate, 230 Pa. 346 (1911), the question was presented, whether testamentary dispositions appearing after the signature are presumed to have been written before or after the execution of a will. The court held that in the absence of proof the presumption is that they were written subsequent to the signature; and if unattested and unsigned they are merely void, and do not invalidate the will under a statute requiring that it be "signed at the end thereof."

To reach the presumption to which the court subscribes, requires, it is submitted, the indulgence of two presumptions: (1) That words following the signature are additions to the will, and were not a part of the original draft thereof; (2) that all additions, alterations, etc., were made subsequent to the signature.

In definitely pronouncing the second presumption mentioned, the court is simply settling the law of Pennsylvania in accord with the law of England and the great majority of American jurisdictions. See 1 Jarman on Wills (1910), 156, and cases cited; Page on Wills (1901), § 432. There is, therefore, nothing unusual or striking in connection with the rasing of this presumption.

But in presuming, in the absence of proof to the contrary, that words following the signature are additions to, and not a part of, the will, the court appears to be taking a more decided step. The presumption falls within that category which is academically denominated, rebuttable presumptions of law. These presumptions may be classified under three headings, namely, those based on the probative force of the evidence, those which owe their existence to some policy of the law, and those which have their origin in procedural expediency.

A case in which the last-named type of presumption was raised was Moore v. The Railroad, 173 Mass. 335 (1899). But obviously there is no procedural convenience which could possibly dictate the presumption in the case at bar. It must, therefore, belong to one of the two other classes mentioned.

Rebuttable presumptions of law based on the probative force of the evidence come into being where one fact follows another so often that it may be regarded as the normal order of events. But it is submitted that it cannot be said with assurance that words following the signature of a will, are so often written subsequent to the signature, that that may be regarded as the normal order of events. For in one of the few cases which have arisen in Pennsylvania, it was definitely shown that the testator had written the words before signing. Wineland's Appeal, 118 Pa. 37 (1887).

The presumption seems, therefore, to be of the third order and to be supported by some policy of the law. If this be so, the particular policy of the law must be one favoring testacy as opposed to intestacy. Needless to say, this has not always been the policy of the law when dealing with alleged testamentary documents in courts of probate, as contrasted with courts of construction.

Whatever its basis and whatever its effect, the decision in Taylor's Estate, establishes a rule of presumption contrary to that which was, prior to the decision of Teed's Estate, 225 Pa. 633 (1909), regarded as the rule in Pennsylvania; pronounced in Hays v. Harden, 6 Pa. 409 (1847). That decision had been generally regarded as setting up the presumption that words following the signature were written prior thereto. That rule was repudiated in Teed's Estate, *supra*, by way of dictum, and Taylor's Estate crystallizes the dictum in Teed's Estate into established law.